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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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I. THE SECRETARY'S RECOUPMENT RULES ARE CONSISTENT WITH THE SOCIAL SECURITY ACT

1. Respondents argue (Br. 6, 12-21) that Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), requires the Secretary "to engage in a very exacting [pre-recoupment] inquiry in order to establish whether the recipient [of an overpayment] was at fault or whether recoupment would cause a financial hardship and be

contrary to the purpose of Title II" (*id.* at 16). Part of this statutorily required pre-recoupment inquiry, respondents contend, is an oral hearing.[1]

Although respondents now assert (Br. 15) that "[t]he exact language used by Congress in §204(b) is extremely important," they devoted scant attention to this language in the court of appeals (see Elliott Br. 39-40 & n.15; Buffington Br. 8-14). That court did not address the statutory argument in either of its opinions, and the district court in *Elliott* likewise concentrated on respondents' constitutional attack on the Secretary's procedures.[2] In view of the ordinary judicial preference to resolve questions on statutory rather than constitutional grounds where such a course is possible, the opinions below reflect an apparent assumption that if respondents are entitled to a pre-recoupment oral hearing, they are entitled to one only because the Due Process Clause, and not Section 204(b), requires it. This assumption is hardly surprising, because respondents' statutory argument is insubstantial.

The place to begin any consideration of the Social Security Act's handling of the recovery of overpayments is Section 204(a). That provision states the general rule that in cases of overpayments or underpayments "proper

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[1]A similar statutory argument is advanced by the American Federation of Labor and Congress of Industrial Organizations as amicus curiae (Amicus Br. 7-9). Recognizing that the statutory language of Section 204(b), even if construed to require some form of pre-recoupment inquiry by the Secretary, does not mention an oral hearing, the AFL-CIO suggests (*id.* at 8-9 & n.6) a remand to permit the court of appeals or the district courts to fashion an appropriate remedy for the Secretary's current practice of conducting a waiver investigation only when waiver is requested by an overpaid beneficiary. Because the Secretary's existing procedures fully comport with the relevant statutory provisions (see pages 3-9, *infra*), the alternate relief suggested by amicus is no more justified than the mandatory pre-recoupment hearings sought by respondents.

[2]The district court in *Buffington* did not write an opinion.

adjustment or recovery shall be made, under regulations prescribed by the Secretary * * *." Section 204(b) then describes an exception to the general rule that overpayments should be recovered. The statute provides that overpayments should not be recovered from "any person who is without fault if such * * * recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Respondents interpret this language to mean that the Secretary may recover a Social Security overpayment only if he has first conducted a personal and financial investigation of the beneficiary involved. Included in that investigation, respondents argue, must be an opportunity for a pre-recoupment oral hearing. Respondents assert that the Act imposes this obligation to investigate whether or not the beneficiary requests waiver.

No such requirement can fairly be derived from the language, history, or purpose of Section 204(b). Section 204(b) does not direct the Secretary to conduct a "very exacting inquiry" into a beneficiary's personal and financial status before attempting to recover a previous overpayment. Indeed, the language of the statute is fully consistent with the Secretary's existing practice of notifying the affected beneficiary of the proposed recoupment and postponing recovery only when the beneficiary indicates that he does not believe he was overpaid or that, in his opinion, recovery should be waived.

Nothing requires the Secretary to engage in an inquiry that the beneficiary himself does not believe is necessary. This Court has never held that the Constitution requires the government to give a hearing to a person who does not desire one. Even when the Constitution requires some particular procedures before a decision can be made, it requires only an "opportunity" to be heard (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) or "an avenue of redress * * * should [the affected

person] wish to contest" the proposed decision (*Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 13 (1978)). Cf. *Codd* v. *Velger*, 429 U.S. 624 (1977). There is no reason to conclude that Congress wanted the Secretary to give hearings even to persons who do not "wish to contest" his proposed decisions. Absent an assertion by the beneficiary that the Secretary's overpayment determination is erroneous or that recoupment should be waived on equitable grounds, the Secretary can legitimately conclude that recovery will not defeat the purpose of the Social Security insurance program and will not offend "equity and good conscience."

Section 204(a) explicitly contemplates a system of overpayment recoveries governed by regulations promulgated by the Secretary. The statute does not establish any particular pre-recoupment procedures; Congress instead relied on the Secretary to devise a fair and efficient method of adjusting overpayments, in light of his experience in administering the Social Security program. As this Court stated in *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976), "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." The Secretary's recoupment procedures produce a fair and workable accommodation between the interests of individual beneficiaries and the needs of the Social Security program. They implement, and do not violate, the statutory command to forgo recovery where it would be "against equity and good conscience."[3]

[3]The AFL-CIO and, to a lesser extent, respondents suggest that, if the Secretary's procedures result in errors, they violate the statute (Amicus Br. 5-7; Resp. Br. 4-10). This argument is unpersuasive, because any conceivable set of procedures will produce some errors. It is the errors, not the procedures, that violate the statute. If any procedure that might produce errors also were held to violate the statute, then no governmental decision could be made without elaborate prior hearings. (After all, governmental decisions in general must conform to substantive statutory rules.) But this line of argument is unavailing to respondents. The appropriate inquiry should be not whether the Secretary makes some mistakes under his procedures, but whether the procedures and their results, considered in toto, violate the Due Process Clause or Section 204(b) because they create an unacceptably great risk of mistakes.

Respondents' reading of Section 204(b) would produce absurd results. The Secretary would be required to investigate the personal and financial situation of all 1.25 million Social Security beneficiaries who are overpaid each year (Pet. App. 99a). If the statute requires such an investigation in all cases, the Secretary would be compelled to undertake a "very exacting inquiry" of the kind sought by respondents, even in cases where a beneficiary agrees that he has been overpaid and does not object to recovery. This would entail an intolerable waste of scarce administrative resources, with no benefit whatever to the beneficiary himself or the effective administration of the Social Security insurance program. It would also involve an unnecessary and unwanted intrusion into the personal lives of the thousands of beneficiaries who are content to permit the recovery of overpayments and do not object to receiving only the amount to which they are entitled.

Congressional approval of the Secretary's procedures for recovering overpayments and granting waivers in appropriate cases is implicit in the 1967 amendments to the Social Security Act and their legislative history. Congress amended Section 204(a) to provide that overpayments can be recovered from persons obtaining benefits on the basis of the overpaid person's earnings record, even if the overpaid person is no longer alive. 81 Stat. 860-861. At the same time, Congress amended Section 204(b) to provide that a beneficiary liable for repayment of an overpayment made to another person

may obtain waiver, even if the overpaid person was at fault in receiving the overpayment, as long as the beneficiary from whom recovery is sought was not at fault. *Ibid.* These adjustments in the previously existing statutory scheme governing waiver and recoupment of overpayments show that Congress reviewed the functioning of that system and found it satisfactory, except in the details changed. Had Congress thought that the Secretary's procedures for recovering overpayments were contrary to the statutory requirements, it would not have missed the opportunity in the comprehensive 1967 amendments to correct the Secretary's error. Cf. *Lorillard* v. *Pons,* 434 U.S. 575 (1978); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 455-457 (1978).

California Human Resources Department v. *Java,* 402 U.S. 121 (1971), on which respondents rely, does not support their position. That case involved a completely different statute, Title III of the Social Security Act, providing for grants to states for unemployment compensation. The case turned on this Court's interpretation of the "when due" language in Section 303(a)(1) of the Act, 42 U.S.C. 503(a)(1). The Court found that this portion of the federal statute was incompatible with a state provision that suspended unemployment compensation benefits whenever an employer appealed a determination that a particular worker or group of workers was eligible for benefits. Accordingly, the Court invalidated the state law. Apart from the plain statutory differences between *Java* and the present case, there is a significant difference between the status of the claimants in the two cases at the time benefits are suspended or reduced. In *Java* the workers were by hypothesis entitled to benefits unless the employer was successful in overturning an eligibility determination on appeal. Here, by contrast, the Social Security beneficiaries have been overpaid, and they are not entitled to keep their overpayments unless the

Secretary determines that recovery would defeat the purpose of Title II of the Act or would be against equity and good conscience. Once the Secretary has made an initial determination, on the basis of written submissions by persons seeking waiver, that that relief is inappropriate, the rationale of *Java* does not prohibit the Secretary from proceeding with recoupment, subject to a reversal of his decision and reimbursement of withheld benefits after a hearing before an administrative law judge or further administrative or judicial review. See *Lavine* v. *Milne,* 424 U.S. 577 (1976).

2. The AFL-CIO raises two additional statutory arguments (Amicus Br. 9-12) that warrant a brief response. Neither was expressly presented to the court of appeals, and there is thus a substantial question whether the decision of the court of appeals can be sustained on these grounds. Although a party may urge in support of his judgment any grounds that were adequately preserved below (see *United States* v. *New York Telephone Co.,* 434 U.S. 159, 166 n.8 (1977)), we doubt that it is appropriate here to inject new grounds that were not raised at all. But however that may be, the arguments of amicus are groundless.

a. The AFL-CIO relies on Section 205(b) of the Act, 42 U.S.C. 405(b), as the source of an overpaid beneficiary's asserted right to an oral hearing before the beginning of recoupment. But Section 205(b) simply provides for an oral hearing after the Secretary's decision on a person's application for payment. Even if a request for waiver is an "application for payment" within the meaning of Section 205(b), the Secretary's "decision" on that request does not occur until after the beneficiary has completed and submitted the necessary forms in support of his waiver request, and the requirement of an oral hearing would not arise until after the Secretary's decision.

Section 205(b) provides at most that an oral hearing should be made available after the Secretary's decision in response to a waiver application. The statute says nothing about whether the beginning of recoupment must be postponed, pending the completion of the hearing review procedure.[4] Amicus' citation of *Greene* v. *McElroy*, 360 U.S. 474 (1959), simply assumes the conclusion amicus hopes to establish, *i.e.*, that there is some constitutional infirmity in the Secretary's existing procedures and that the Act should be construed to avoid any constitutional problem. But, as we have argued at length in our main brief, the Secretary's decision not to provide pre-recoupment oral hearings does not violate the Due Process Clause, and, accordingly, there is no constitutional problem to avoid.

b. The AFL-CIO also contends (Br. 10-12) that Section 225 of the Act, used as an aid to the interpretation of Section 205(b), indicates that the latter provision requires an oral hearing before the beginning of recoupment. This argument is incorrect. Section 225 applies only to the suspension of benefits based on disability, when the Secretary believes that the underlying disability no longer exists. The statute permits the Secretary to suspend benefits in such a situation without a prior oral hearing.

Amicus argues that the inclusion of Section 225 in Title II implies that Section 205(b) ordinarily requires an oral hearing before any reduction of benefits, but this position

[4]The proper application of Section 205(b) can be seen most clearly by considering the case of the new applicant for Social Security benefits. If his application is initially rejected by the Secretary, the Secretary is surely under no obligation to begin the payment of benefits, pending review of the initial decision at an oral hearing. Indeed the Act prohibits him from doing so. See 42 U.S.C. 405(i). By the same token, once the Secretary determines on the basis of written submissions that a beneficiary is not entitled to retain an earlier overpayment, Section 205(b) does not require the Secretary to permit the beneficiary to keep the improperly retained funds until after the initial decision has been sustained at an oral hearing.

ignores the fact that recovery of overpayments under Title II is governed by Section 204(a) and the Secretary's regulations promulgated thereunder. Section 225 is no more than another statutory provision, dealing with an entirely different situation in which the Secretary has reason to believe that the basic entitlement to benefits no longer exists; it has no bearing on the propriety of the Secretary's recoupment procedures. By definition, no beneficiary is ever entitled to an overpayment, even assuming his continued eligibility for insurance benefits. The Secretary must waive recovery only if the statutory requirements for waiver are met. Section 225 does not imply any general policy to forbid recovery of funds to which a beneficiary was not originally entitled until he has had an opportunity to demonstrate at an oral hearing why recovery should be forgiven. If anything, Section 225 suggests just the opposite result. It permits immediate suspension whenever the Secretary *believes* that disability *may have* ceased. In an overpayment situation, the Secretary *knows* that the beneficiary was not entitled to the funds he received, and therefore there is even more reason to permit recoupment to begin before an oral hearing is held.

II. RESPONDENTS' BRIEF CONTAINS NUMEROUS MISSTATEMENTS

Respondents' brief contains numerous misstatements and inaccuracies, many of which do not require a reply. We rely for the most part on the initial brief for the Secretary and respond here only to the most egregious errors in the opposing brief.

1. Respondents state categorically (Br. 4 n.1) that, when the Secretary decides to recoup a past overpayment by reducing current monthly benefits, "[t]he period of the suspension and the amount of reduction are unilaterally determined by the Secretary." If respondents mean that the Secretary acts without consulting the affected persons,

the statement is not true.[5] As the extended discussion of the partial adjustment system in our main brief indicates, the Secretary makes every effort to reach agreement with the recipients of overpayments on a mutually acceptable recovery schedule. In most cases, recovery at the rate requested by the beneficiary is granted, unless the beneficiary is at fault in receiving the overpayment or unless the Secretary's investigation of the beneficiary's financial status reveals that a higher rate of recovery will not result in any hardship. Even where a beneficiary is at fault, the Secretary will not reduce his monthly benefits by more than 25%, unless his financial situation permits more rapid recovery.

2. Respondents also assert (Br. 8, 34) that, when an overpaid beneficiary requests waiver, it is wholly within the Secretary's discretion to decide whether to defer recoupment until an initial decision on the beneficiary's waiver application has been made. This is false. See Pet. App. 126A, 130A, 134A, 139A. The Claims Manual plainly requires that recovery await the Secretary's determination with respect to waiver.

3. Respondents' brief is confusing and inaccurate in its discussion (Br. 28-32) of the Claims Manual procedures that became effective in January 1979.

Respondents mischaracterize the Secretary's position when they suggest that his argument depends on the nature of the partial adjustment system implemented by the recent changes. The Secretary fully adheres to his position, taken in the court of appeals and in the petition for certiorari, that, even without the modifications, the method for the recovery of overpayments satisfied the requirements of due process. The Constitution does not

[5]If respondents mean only that the Secretary reserves the ultimate decision to himself, the statement is true but trivial; the Secretary also makes the decision himself if he holds an oral hearing.

require a prior oral hearing; this does not depend on the precise details of the partial adjustment system. This was no reason, however, not to inform the Court of changes in the recoupment system that further diminish the private interest in the uninterrupted receipt of benefits pending an oral hearing to review the Secretary's waiver decision.

Respondents also state (Br. 31) that "apparently these new procedures prohibit the Secretary from granting 'partial adjustment' to recipients who assert their statutory rights to waiver." See also AFL-CIO Amicus Br. 8, asserting that the Secretary's procedures "penaliz[e] those who do come forward with the possibility of a larger deprivation of benefits than if they had failed to assert statutory rights." These criticisms of the Secretary's recoupment procedures are unwarranted. Partial adjustments are available to beneficiaries who seek waiver, and no penalty is imposed for requesting relief from recovery. When the financial information gathered by the Secretary in connection with a waiver request indicates that waiver is not justified and that the previous overpayment can be recovered at a rate in excess of 25% of monthly benefits without jeopardizing the beneficiary's ability to meet current expenses, there is no reason to permit recovery at a lower rate just because the beneficiary asks for it. If he is not entitled to retain the overpayment and he can afford to pay it back at a faster rate than that initially proposed by the Secretary, he should be required to do so. No penalty is involved, because the money did not belong to him in the first place.

4. Without explanation, respondents announce (Br. 21 n.10) that the Secretary does not question the court of appeals' ruling (Pet. App. 3A, 24A) that pre-recoupment oral hearings are required in situations where a request for reconsideration of the determination that an overpayment has occurred raises an issue of credibility.

This is unfounded. Both the Secretary's petition (Pet. 2, 10 n.7, 11, 18) and his main brief (Br. 16-17 n.19, 39-41) make it clear that he objects to the requirement of a pre-recoupment oral hearing in both the reconsideration and the waiver context. The existence of a credibility issue in a particular case does not require a prior oral hearing, because constitutional rules "are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge, supra,* 424 U.S. at 344.

5. In his main brief (Br. 61), the Secretary noted that *Frost* v. *Weinberger,* 515 F.2d 57 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976), is not persuasive authority for the existence of jurisdiction in the nature of mandamus under 28 U.S.C. 1361, because the case was decided before *Weinberger* v. *Salfi,* 422 U.S. 749 (1975), and therefore did not take account of that decision's emphasis on the exclusivity of the jurisdiction provided in the Social Security Act for review of claims arising under the Act. Respondents now assert (Br. 50 n.18) that *Frost* is still good law, because the Secretary sought review in this Court of the court of appeals' jurisdictional ruling and his petition for a writ of certiorari was denied nine months after the decision in *Salfi.*

Respondents' attempt to resurrect *Frost* is unavailing, not only because this Court has repeatedly refused to attribute significance to the denial of certiorari, but also because the petitioner in the case was not the Secretary. The Social Security beneficiary whose due process claim had been rejected by the court of appeals, after the court found jurisdiction under Section 1361, was the petitioner in *Frost.*

For the foregoing reasons and the reasons stated in the Secretary's principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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